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State v. Johnson Respondent's Brief Dckt. 41168

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Appellant,

v.

DARRICK DONAHUE JOHNSON,

Defendant-Respondent.

DOCKET NO. 41168

**Kootenai County Case No.
CR-2012-17976**

REPLY BRIEF

**Appeal from the District Court of the First Judicial District of the State of Idaho,
In and For the County of Kootenai**

The Honorable Fred M. Gibler, District Judge, Presiding

**Lawrence G. Wasden
Attorney General
State of Idaho**

**Paul R. Panther
Deputy Attorney General
Chief, Criminal Law Division**

**Kenneth K. Jorgensen
Deputy Attorney General
Criminal Law Division
PO Box 83720
Boise, ID 83720-0010
(208) 334-4534**

Attorneys for the Appellant

**Malcolm Dymkoski
Attorney at Law
1110 W. Park Place Suite 210
Coeur d'Alene, ID 83814
Tel: (208) 765-6077
Fax: (208) 664-6089
Email: maldymkoski@gmail.com
Idaho State Bar No. 3014**

Attorney for the Respondent

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STATEMENT OF THE CASE

Nature of the Case

The State has appealed from the *Judgment of Acquittal* entered by the District Court on May 14, 2013.

Course of the Proceedings

The Defendant, Derrick Johnson, was charged with Grand Theft by Unauthorized Control, I.C. §§18-2403(3) and 2407(1)(b), by “knowingly tak[ing] unauthorized control of funds worth over \$1000.00 (One Thousand Dollars), the property of Beaudry Motor Sports, to wit: \$55,256.00 (Fifty-Five Thousand Two Hundred Fifty-Six Dollars), with the intent to deprive another of property or appropriate to himself certain property of another....” R., pp. 30-31. The State subsequently admitted that “[o]bviously, the control of [Mr. Johnson] of the check on October 8, 2011 was authorized.” R., p. 107, L. 5.

The trial was commenced on March 26, 2013. Tr., p.8. At the close of the State’s evidence, Mr. Johnson requested entry of a judgment of acquittal. Tr., p.65, L. 24 to p. 66., L. 11. The District Court granted the Motion. Tr., p. 79, L. 2. The District Court then reversed itself and denied the Motion. Tr., p. 97, L. 8. The trial

was then resumed and the jury found Mr. Johnson guilty of grand theft by unauthorized control. Tr., p. 256, L. 21 - 24.

Mr. Johnson timely filed his *Motion for Entry of Judgment of Acquittal* on April 9, 2013. R., pp. 94-95. The District Court entered its *Judgment of Acquittal* on May 14, 2013. The State filed its *Notice of Appeal* on June 13, 2013.

Statement of Facts

The evidence produced at trial was unequivocal that Steve Beaudry wrote a check drawn on the Beaudry Motor, Inc. checking account at Mountain West Bank, in the amount of \$55,256.00, made payable to Edge Performance, Inc., an Idaho corporation. Tr., p. 8, L. 17-25; Exhibit 3, p. 134; Tr., p. 23, L. 6-9. Edge Performance was a Kawasaki motorcycle dealer. Tr., p. 139, L. 1, to p. 140, L. 18. Beaudry Motor, Inc. was ordering four Kawasaki Concours motorcycles from Edge Performance and, in turn, Edge Performance would have to order those motorcycles from Kawasaki. Tr., p. 21, L. 6-23. Mr. Johnson was the president and sole shareholder of Edge Performance, Inc. Tr., p. 138, L. 21 to p. 139, L. 14. Mr. Johnson deposited the check into the Edge Performance checking account at Bank of Coeur d'Alene on October 8, 2011. Exhibit 1, p. 28 (Deposit slip located at the bottom of the left column, dated 10/8/11). The check did not clear until October 11, 2011. Exhibit 1, p. 22 (Entry for

10/11/2011, a deposit of \$59,748.44). The four motorcycles were not provided to Beaudry Motor Sports, nor was \$55,256.00 paid to Beaudry Motor Sports by Edge Performance. Tr., p. 35, L. 18 to p. 37, L. 13. In granting the *Motion for Entry of Judgment of Acquittal*, the District Court held:

The statute involved in our case required the State to prove that the defendant exercised unauthorized control over or made an unauthorized transfer of an interest in the property of another person with the intent of depriving the owner thereof. As was the situation in *Henninger* and *Bennett*, once the victim here gave the money to the defendant, the victim parted with his interest in the money. At that point the victim was no longer the owner of the money. When the defendant breached the agreement by failing to deliver the motorcycles, the victim had the right to sue for specific performance or damages. However, because he did not retain an interest in the money, I've come to the conclusion that there was no violation of Idaho Code Section 18-2403 subsection 3.

Tr., p. 270, L. 3-17.

ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Mr. Johnson could not be convicted of theft from Beaudry Motor Sport, where the funds were from Beaudry Motor, Inc., and then became the property of Edge Performance, Inc.
2. Mr. Johnson cannot be found guilty for non-performance of a contractual obligation, because the Idaho Constitution forbids imprisonment for debt.

ARGUMENT

1. As Edge Performance, Inc. was given unconditional ownership of the funds, and as the State concedes that the receipt of those funds by Edge Performance was authorized, Mr. Johnson cannot be guilty of exercising unauthorized control over those funds.

“The proper description of the standard of review for a motion for judgment of acquittal under I.C.R. 29(c) is whether there was substantial evidence upon which a trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Hoyle*, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004).

Mr. Johnson was charged with violation of I.C. §18-2403(3), grand theft by unauthorized control. The *Information* charged that Mr. Johnson

on or about October, 2011, in the County of Kootenai, State of Idaho, did knowingly take unauthorized control of funds worth over \$1,000.00 (One thousand dollars), the property of Beaudry Motor Sport, to wit: \$55,256.00 (Fifty-Five Thousand Two Hundred fifty-Six Dollars), with the intent to deprive another of property or appropriate to himself certain property of another.

“Clearly, the language of [I.C. §18-2403(3)] corresponds to the tort of conversion in Idaho civil law, which tort has been defined as dominion over chattels by a person not the owner, in a manner inconsistent with the rights of the owner. [Citations omitted.]” *Perry v. Farm Bureau Mut. Ins. Co. of Idaho*, 130 Idaho 100, 104, 936 P.2d 1342, 1346 (Ct. App., 1997). The elements of conversion are “(1) that

the charged party wrongfully gained dominion of property; (2) that property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is personal property.” *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010). Mr. Johnson was not charged with wrongfully taking, obtaining, or withholding property from the owner, I.C. §18-2403(1), or obtaining property by trick, deception, embezzlement, by false pretenses or false promise, I.C. §18-2403(2). He was only charged with knowingly taking or exercising unauthorized control over a check for \$55,256.00.

The State argues that a bailment was created, such that Mr. Johnson was a bailee of funds belonging to Beaudry Motor Inc. That argument is in error. Beaudry Motor Inc. did not own those funds, represented by the check, once it gave the check to Edge Performance. There was no requirement that the check be deposited into a trust fund, by which the funds would be deemed to still be owned by Beaudry Motor Inc. All elements of ownership of those funds by Beaudry Motor Inc. were given to Edge Performance. It is axiomatic that Edge Performance could not be a bailee of funds that it owned.

The State argues that Mr. Johnson held those funds in trust, similar an attorney holding funds in trust for a client. *Brief of Appellant*, p. 10. However, an attorney is required to hold client funds in a trust account, where those funds are still

deemed to belong to the client. Rule 1.15, Idaho Rules of Professional Conduct. Once a check is made payable to a payee, and is given to that payee, it becomes the property of the payee. The requirement that those funds be deposited into a trust account makes clear that the presentation of a check to a payee, and the subsequent negotiation of that check, does not make the payee the owner of those funds. There was no such requirement for Mr. Johnson.

Even if, for the sake of argument, Edge Performance could be deemed a bailee of the funds, I.C. §18-2403(3) still does not apply. The alleged misappropriation of property to which one is entrusted is a form of embezzlement. However, Mr. Johnson was not charged with embezzlement.

Former I.C. §18-2407 covered one type of embezzlement now treated as a form of theft. The Statute provided:

Every person entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it to them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

State v. Caldwell, 112 Idaho 748, 735 P.2d 1059, Note 2 (Ct. App. 1987). The present I.C. §18-2403(2) states that theft includes property taken “(b) By conduct heretofore defined or known as ... embezzlement” In this matter, Mr. Johnson was charged with violating I.C. §18-2403(3), not I.C. §18-2403(2).

Neither Mr. Johnson nor Edge Performance were bailees, and could not have committed embezzlement. When Edge Performance received the check on October 8, 2011, it received unconditional ownership of the funds. The parties (Edge Performance and Beaudry Motor, Inc.) entered a unilateral contract wherein Beaudry Motor Inc. stated that it would give Edge Performance \$55,256 if Edge Performance promised to provide four motorcycles for Beaudry Motor, Inc. Edge Performance promised to provide the motorcycles, and Beaudry Motor Sports gave Edge Performance the funds, in the form of a check. Edge Performance became the owner of the funds at that instant. The check for the funds was an **unconditional** promise to pay those funds to Edge Performance. Edge Performance had the absolute right to negotiate that check, which it did when it was deposited into its bank account. The bank then became a holder in due course, which it could not have been had the check been a **conditional** promise to pay those funds.

Beaudry Motor Sports gave Edge Performance a check in the amount of \$55,256.00, payable “to the order of Edge Performance”, and drawn upon the account of Beaudry Motor, Inc. at Mountain West Bank. “‘Check’ means (I) a draft, other than a documentary draft, payable on demand and drawn on a bank” I.C. §28-3-104(6). “An order that meets all of the requirements of subsection (1) of this section, except paragraph (a), and otherwise falls within the definition of ‘check’ in subsection (6) of

this section is a negotiable instrument and a check.” I.C. §28-3-104(3).

Except as provided in subsections (3) and (4) of this section, ‘negotiable instrument’ means an **unconditional promise** or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (a) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (b) Is payable on demand or at a definite time; and (c) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money”

(Emphasis added.) I.C. §28-3-104(1).

Except as provided in this section, for the purposes of section 28-3-104(1), a promise or order is unconditional unless it states (I) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

I.C. §28-3-106(1). “A promise or order is ‘payable on demand’ if it ii) does not state any time of payment.” I.C. §28-3-108(1).

“‘Issue’ means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.” I.C. §28-3-105(1). “The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized signing as, or in the name on behalf of, the issuer of the instrument. The instrument is

payable to the person intended by the signer” I.C. §28-3-110(1).

The exercise of control by Edge Performance over the check for \$55,256.00 was authorized by Beaudry Motor, Inc. The check was an unconditional promise to pay \$55,256.00 to the order of Edge Performance, was payable on demand, and was issued when it was first delivered to Edge Performance on October 8, 2011, thereby giving rights on that check to Edge Performance, including the right to enforce the check. “‘Person entitled to enforce’ an instrument means (I) the holder of the instrument” I.C. §28-3-301. “‘Holder’ means: (A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession” I.C. §28-1-201(21). That check was then properly negotiated by Edge Performance, Inc. to the order of Bank CDA (Coeur d’Alene). Exhibit 3, p. 134.

The State argues that embezzlement by theft of bailed property violates I.C. §18-2405(3). That argument is incorrect. The Idaho Court of Appeals held that, in determining that the Defendant has violated I.C. §18-2403(3), it must be found that the Defendant’s **possession** of the property “constituted ‘unauthorized control’ of property of which he was not the ‘owner’” *State v. Henninger*, 130 Idaho 638, 640, 945 P.2d 864, 866 (Ct. App. 1997). In *Henninger*, the Defendant purchased a truck from a motor vehicle dealer by executing a secured installment contract, and by

executing a promissory note for the down payment, payable the next day. The Defendant failed to pay off the promissory note. The dealership then discovered that the Defendant did not live at the residence address that he had given the dealership, he did not continue his employment as of the date that he purchased the truck, and his parents, who he had advised the dealership would provide the funds to pay the note given for the down payment, did not live at the Nevada address, and did not have the telephone number, that the Defendant had provided the dealership.

Nevertheless, the Court of Appeals held that the Defendant was authorized to exercise control when he took possession of the truck, as the installment sale contract stated that the Defendant was purchasing the truck, and the dealership executed and delivered to the Defendant all of the documents necessary to transfer title. It did not matter that the Defendant lied about his ability to pay the down payment, or about his ability to pay the installment contract, or about the location of the truck which secured the installment contract. The only thing that was crucial was that the Defendant had the authority to take possession and ownership of the truck, even though the Defendant used fraudulent means to obtain that authority. If even a fraudulently induced transfer of ownership or control of property cannot constitute a violation of I.C. §2403(3), then the subsequent failure to pay the debt created by that transfer of ownership or control cannot constitute a violation of I.C. §2403(3).

In a later case, *State v. Culbreth*, 146 Idaho 322, 326, 193 P.3d 869, 873 (Ct. App. 2008), the Defendant was charged with burglary, which required proof of entry with the intent to commit a theft. She broke into an animal shelter at night in order to recover her dog, without paying for the fees that the animal shelter charged for caring for the dog. The Court of Appeals first found that a theft, as defined in I.C. §18-2403(1), could not include the Defendant's recovery of her own dog. Nor could it be deemed theft of the services performed by the animal shelter, as the Defendant neither knew of, nor requested, those services. The only issue then, was whether the theft consisted of the Defendant's avoidance of payment of the fees for those services provided by the animal shelter. Citing *Henninger*, but still referring to the term "theft" as used in I.C. §18-2403(1), the Court of Appeals held that

In the present case, we likewise conclude that the legislature did not intend [I.C. §18-2403(1)] to criminalize the nonpayment of an existing, lawfully incurred financial obligation. The words of [I.C. §18-2403(1)] evince a legislative intent to prohibit active steps to wrongfully acquire something of value from another, not passive nonpayment of an obligation that one already owes. It is the trickery, deception, extortion or similar mischief **used to induce** the victim to provide something of value to the perpetrator that [I.C. §18-2403(1)] proscribes, not the mere dishonoring of an obligation that was innocently created. Moreover, if [I.C. §18-2403(1)] were interpreted to include mere nonpayment of debt, it would likely run afoul of Article I, section 15 of the Idaho Constitution, which specifies that "[t]here shall be no imprisonment for debt in this state except in cases of fraud.

(Emphasis added). *State v. Culbreth*, 146 Idaho at 326, 193 P.3d at 873.

The holdings in *Henninger* and in *Culbreth* both indicate that the determination of whether Mr. Johnson exercised unauthorized possession or control over the check must be made at the time that the possession or control is initiated. That possession or control was authorized by Beaudry Motor, Inc. upon delivery of the check to Edge Performance and, at that same instant, Edge Performance became the absolute owner of the check. There certainly is an argument that there is a breach of contract, or that a debt is owed by Edge Performance to Beaudry Motor, Inc. However, a breach of contract or debt owing is a civil matter, not a criminal matter. And, as quoted in *Culbreth*, above, a criminal enforcement of a debt violates that protections afforded by the Idaho Constitution.

Even if it could be claimed that the jury had sufficient evidence to find that Mr. Johnson obtained possession of the check by fraud or false promise, that does not support the conviction. As fraudulently induced transfer of ownership or control does not violate I.C. §18-2403(3), and “theft” does not include mere nonpayment of debt, then the only issue in the instant case is whether Mr. Johnson had unauthorized control of the funds. Edge Performance had the full authority to possess the check, in the same manner that the Defendant, in *Henninger*, had the full authority to possess the truck.

The State attempted to prove Mr. Johnson’s guilt by presenting testimony that

Edge Performance did not place an order with Kawasaki for the four motorcycles. That testimony was solely produced by leading questions propounded to Mr. Johnson upon cross-examination by the State, to which Mr. Johnson did not admit. Tr., p. 208, L. 24-25. The theory of that evidence was that Derrick Johnson exercised unauthorized control over the funds by failing to order the motorcycles from Kawasaki. That theory is incorrect because, at most, that testimony could only show that the Defendant received that check from Beaudry Motor Sports under false promise, I.C. §18-2403(2)(d). But, the Defendant was not charged with that crime.

Even if that theory has merit, the evidence does not support the theory. The State had, in its case in chief, produced its Exhibit 2 (p. 107), which are the records produced by Kawasaki Motors. In Exhibit 2, p. 107, the letter from Kawasaki to the Kootenai County Prosecuting Attorney's Office, it states that "[Kawasaki] has diligently searched its records for any and all information relating to Kawasaki Concours motorcycles **sold** by KMC to edge Performance, Inc." (Emphasis added). In Exhibit 2, p. 108, at paragraph 3, it states that "Prosecuting Attorney Arthur Verharen agreed to limit the scope of the subject Subpoena Duces Tecum to ALL EVIDENCE RELATED TO CONCOURS MOTORCYCLE **SALES** BY KAWASAKI MOTORS CORP., U.S.A. TO EDGE PERFORMANCE, INC." (Emphasis added). It does not purport to show motorcycles **ordered** from Kawasaki by Edge Performance.

Although this Court must draw all inferences in favor of the State in determining whether the judgment of acquittal was proper, the State cannot create its own reasonable doubt with evidence it produces, and then ask the Court to ignore the doubt that it has created.

Conversely, the State also tried to assert that, in fact, Edge Performance ordered at least two of the motorcycles but diverted them elsewhere. This evidence could not be used to show that Edge Performance exercised unauthorized control over Beaudry Motor Inc.'s motorcycles, as the criminal charge against Mr. Johnson alleged that the Defendant exercised unauthorized possession or control over the funds, not the motorcycles. Presumably, the State's theory is that Mr. Johnson exercised unauthorized control over Beaudry Motor Inc.'s funds by purchasing motorcycles for other customers with those funds.

Linda Holzer testified on behalf of the State that, when she met with Mr. Johnson in January, 2012, to discuss purchasing the Edge Performance Kawasaki dealership, Mr. Johnson pointed to a Kawasaki Concours on the showroom floor and stated that it was Mr. Beaudry's motorcycle. Tr., p. 52, L. 22-24. Mr. Johnson testified that he did have a Concours motorcycle on the showroom floor at that time, pursuant to a one year flooring arrangement with the manufacturer. Tr., p. 178, L. 21 to p. 183 L. 16. The State's Exhibit 2, at page 111, shows that Edge Performance purchased a

Concourse motorcycle on November 11, 2011, and that it was paid for (the balance was reduced to \$0.00) on October 11, 2012, eleven months later, and exactly one year after Bank CDA credited Edge Performance's checking account with the check from Beaudry Motor Sports. State's Exhibit 2, p. 131, entitled Invoice, dated 11/11/11, shows a motorcycle purchased under the Flooring program with a payment date of January, 2013. That same page shows a VIN of JKBZGNC17CA015359 (located on the second line of the second column, entitled "Description"). That is the same VIN as shown on Exhibit 2, p. 111, and is the same VIN testified to by Mr. Johnson. Tr., p. 180, L. 3-21.

The State also produced testimony from Brett Lancaster, the purchasing agent for Spokane County, Washington, that Edge Performance had sold a Kawasaki Concours motorcycle to Spokane County. Tr., p. 61, L. 14-20. He testified that the purchase order for that motorcycle was not issued by Spokane County until November 29, 2011. Tr., p. 62, L. 8-10. Mr. Johnson testified that Edge Performance received that motorcycle from Kawasaki with 90-days free flooring. Tr., p. 186, L. 7-16. The invoice for that motorcycle is also contained in Exhibit 2, p. 130. The payment for that motorcycle is shown in Exhibit P, on page 174. The payment on 02/22/2012 was for \$13,814.00, the same amount as on the Invoice referred to above.

The records produced by Kawasaki Motors, Exhibit 2 (commencing at p. 107),

show that only two Concours motorcycles were sold by Kawasaki to Edge Performance. Those documents only contain two VINs, JKBZGNC17CA015359, which was the motorcycle located in the Edge Performance showroom, and JKBZGNC17CA015409, which was the motorcycle sold to Spokane County. Even if the State could argue that Mr. Johnson's guilt could be proven by showing that he used the funds provided by Beaudry Motor, Inc. to purchase motorcycles that were diverted to other customers, the State has only produced credible evidence to show that Edge Performance purchase two Concours motorcycles, neither purchase being made with those funds.

2. If the District Court's *Judgment of Acquittal* is reversed and remanded, double jeopardy protection does not bar the District Court from reinstating the Jury's guilty verdict and sentencing the Defendant.

The Defendant agrees that if the District Court's *Judgment of Acquittal* is reversed and remanded, double jeopardy protection does not bar the District Court from reinstating the Jury's guilty verdict and sentencing the Defendant. *State v. Carmouche*, ___ Idaho ___, ___ P.3d ___, 2013 WL 6153145 (Ct. App. 2013).

3. Mr. Johnson could not be convicted of theft from Beaudry Motor Sport, where the funds were from Beaudry Motor, Inc., and then became the property of Edge Performance, Inc.

It is axiomatic that Mr. Johnson cannot be tried and convicted of a crime for which he was not charged. Mr. Johnson did not take unauthorized control over that check from Beaudry Motor, Inc. That check was made unconditionally payable to the order of Edge Performance, Inc. and delivered to Edge Performance, Inc. At that point, the check became the property of Edge Performance, and the funds became payable to Edge Performance. As the agent for Edge Performance, Mr. Johnson deposited the check into the Edge Performance checking account. Even if those funds were used by Mr. Johnson to pay for something other than appropriate business expenses of Edge Performance, those funds belonged to Edge Performance. Mr. Johnson was charged with taking unauthorized possession or control over funds belonging to Beaudry Motor Sports. He was not charged with taking unauthorized possession or control over funds belonging to Edge Performance.

Furthermore, for the sake of the argument propounded by the State that some elements of ownership of the funds were not transferred to Edge Performance, those remaining elements belonged to the transferor, Beaudry Motor, Inc., not Beaudry Motor Sports. Mr. Johnson was charged with taking unauthorized control over funds belonging to Beaudry Motor Sports. As the check was drawn on the account of

Beaudry Motor, Inc., the residual rights to those funds, if they existed, would have had to belong to Beaudry Motor, Inc., and Mr. Johnson's unauthorized control over those funds would have been over funds belonging to Beaudry Motor, Inc. rather than Beaudry Motor Sports. Again, it is axiomatic that Mr. Johnson could not be found guilty of a crime for which he had not been charged.

4. Mr. Johnson cannot be found guilty for non-performance of a contractual obligation, because the Idaho Constitution forbids imprisonment for debt.

Article I, Section 15 of the Idaho Constitution provides that: "There shall be no imprisonment for debt in this state except in cases of fraud." "The constitutional prohibition for debt relates to matters basically contractual in nature." *Phillips v. District Court of the Fifth Judicial Dist.*, 95 Idaho 404, 406, 509 P.2d 1325, 1327 (1973). "Moreover, if [I.C. §18-2403(1)] were interpreted to include mere nonpayment of debt, it would likely run afoul of Article I, section 15 of the Idaho Constitution, which specifies that "[t]here shall be no imprisonment for debt in this state except in cases of fraud." *State v. Culbreth*, 146 Idaho at 326, 193 P.3d at 873. As argued above, the relationship between Beaudry Motor, Inc. and Edge Performance was contractual. They entered into a unilateral contract which was arguably breached. Even if Mr. Johnson could be found liable for the breach of

contract, this provision of the Idaho Constitution would preclude criminal liability for that breach.

CONCLUSION

Beaudry Motor, Inc. unconditionally gave the check and the funds to Edge Performance. Therefore, Mr. Johnson, as the president of Edge Performance, cannot have exercised unauthorized control over those funds. As those funds became the unconditional property of Edge Performance, no rights in those funds were retained by Beaudry Motor, Inc. Therefore, neither Edge Performance, nor Mr. Johnson, could be the bailee of those funds, and could not exercise unauthorized control over those funds. The entry of the *Judgment of Acquittal* was proper, and should not be reversed.

As Beaudry Motor, Inc., and not Beaudry Motor Sports, gave the funds to Edge Performance, and not to Mr. Johnson, Mr. Johnson could not be found guilty of unauthorized possession or unauthorized control of funds belonging to Beaudry Motor Sports. The entry of the *Judgment of Acquittal* was proper, and should not be reversed.

I.C. §18, 2403(3) cannot make a breach of contract a crime. To do so would

violate Article I, section 15 of the Idaho Constitution, which specifies that there shall be no imprisonment for debt in this state except in cases of fraud. The entry of the *Judgment of Acquittal* was proper, and should not be reversed.

If the *Judgment of Acquittal* is reversed and remanded, double jeopardy does not bar the reinstatement of the jury's guilty verdict and the sentencing of Mr. Johnson.

Dated January 21, 2014.

MALCOLM DYMKOSKI

I hereby certify that two true and correct copies of this document were mailed by first-class mail, postage prepaid, on January 21, 2014, to:

Kenneth K. Jorgensen
Deputy Attorney General
Criminal Law Division
PO Box 83720
Boise, ID 83720-0010

MALCOLM DYMKOSKI